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No. 86 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL C. RICATTO, MARY V. RICATTO
and KRYSTYNA B. SIDZ,

Petitioners,

— against —

WILLIAM BROCK, U.S. SECRETARY OF LABOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Question I: In an action for review Under Administrative Procedure Act, 28 USC §706, when the record shows prima faciae violation of the applicable procedural rules on the part of the agency, resulting in depriving the applicant the right to be heard by the agency on the issues upon which the ultimate denial was based, may the Court of Appeals, consistently with the rule of Citizens to Preserve Overton Park v Volpe, 401 US 402, uphold the denial on the theory that the applicant should repeat the whole 2½-years procedure all over again to reacquire the right to be heard by the agency on the issues in question?

Question II: May the Court of Appeals rely on its own assertions of fact, which are demonstrably false on the record, to affirm the judgment of the trial court, when in the absence of these assertions reversal would have been mandatory?

Question III: May the administrative agency enforce at random its prior inconsistent decisions against the public as "precedents", while at the same time denying precedential value to the very same decisions as against the agency itself?

Parties

The caption of the case in this Court contains the names of all parties.

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No. 87 -

SUPREME COURT OF THE UNITED STATES

MICHAEL C. RICATTO, MARY V. RICATTO
and KRYSTYNA B. SIDZ,

Petitioners,

-against-

WILLIAM BROCK, U.S. SECRETARY OF LABOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the United States District Court for the Eastern District of New York (Hon. Charles P. Sifton, USDJ), dated June 19, 1986, is not reported, but appears in the Appendix hereto at A-11.

The final judgment of the District Court appears in the Appendix hereto at A-24. The order of the United States Court of Appeals for the Second Circuit, affirming the judgment of the District Court, dated December 10, 1986, is not reported, but appears in the Appendix hereto at A-25. The final order of the United States Court of Appeals, denying petition for rehearing, dated March 9, 1987, appears in the Appendix hereto at A-30.

Jurisdiction

The final order of the United States Court of Appeals for the Second Circuit, denying petition for rehearing, was entered on March 9, 1987. This Court has jurisdiction pursuant to 28 USC §1254.

Statement of the Case

Petitioners, Michael C. Ricatto and Mary V. Ricatto, applied to Respondent, United States Secretary of Labor, for alien employment certification to employ an alien, Krystyna B. Sidz, as a live-in houseworker. Such certification is a legal prerequisite for an alien to apply for lawful permanent resident status in the United States. The applicable regulations promulgated by the Secretary of Labor for the purpose of adjudicating such applications, provide that in order to obtain certification for a live-in houseworker, the employer must justify the live-in requirement as arising from the "business necessity" as opposed to mere preference or convenience.

Mr & Mrs Ricatto justified the live-in requirement with the need to have someone around in case of cardiac emergency that might affect Mrs Ricatto while Mr Ricatto

was away; Mrs Ricatto underwent open heart surgery, and Mr Ricatto occassionally works late due to extensive business responsibilities. They are both over 60 and live alone in large, secluded house in Muttontown, Long Island.

Such need for reassurance in case of likely emergency was held by the Court of Appeals for the First Circuit to be a good reason for live-in requirement. Silva v Secretary of Labor (518 F2d 301). Moreover, the Secretary of Labor had been routinely accepting such reason for live-in requirement prior to the time the petitioners application was submitted. Nevertheless, the Secretary's Certifying Officer (CO) proposed to deny the petitioners application on the ground of failure to document business necessity for live-in requirement, for specific reason that that live-out worker from 9 to 5 or from 8 to 4 would suffice.

In order to protect the public against arbitrary decisions, the Secretary's rules and regulations provide that every specific reason for denial must be first asserted by the Certifying Officer in the preliminary Notice of Findings, to enable the applicant to rebut such reasons, and the final denial may be based only on the reasons specifically asserted in the Notice of Findings and not rebutted by the applicant (20 CFR §656.25, TAG I-F. 656.25).

Mr & Mrs Ricatto stated in their rebuttal letter, that the job required to be performed from 8 to 12 and from 3 to 7 and occassionally as late as 10 PM could not be performed from 9 to 5 or from 8 to 4. Nevertheless, their application was denied by the Certifying Officer for the reason that they failed to document business necessity for live-in requirement, because the job could be performed by a

live-out worker.*

The petitioners requested a review of the Certifying Officer's decision before the Administrative Law Judge (ALJ), and specifically prayed for either one of the following reliefs: (1) to reverse, (2) to remand, or (3) to hold a hearing. The ALJ granted neither one of them; he affirmed the CO's decision without a hearing. However, the reason for denial given in ALJ's decision was distinctly different from that given by the CO.

The ALJ affirmed the denial of the petitioners' application for the reason

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* The Certifying Officer also reasserted two other, openly irrational reasons, properly rebutted by the petitioners, which were later quietly dropped by the Administrative Law Judge and were never reasserted again by the Secretary in the course of judicial review. Although they provide clear and convincing evidence of the Secretary's effort to deny petitioners application on the specious grounds, they are ignored here in order not to cloud the fundamental issue of this action.

that the job could be performed by two live-out workers, and also implied that the care for young children was the acceptable justification of the live-in requirement (A-9). The "precedents" quoted by the ALJ in support of these findings were those of prior ALJ's decisions, which according to the official policy of Department of Labor "are not precedential in nature".**

** At the meeting of the American Immigration Lawyers Association with the United States Department of Labor in Washington on October 7, 1985, i.e. only six weeks before ALJ's decision in Ricatto, the following question was presented to Department of Labor:

Question: In the absence of a system of designation of ALJ decisions as precedent, where different ALJs reached different conclusions on identical issues, how does a Certifying Officer determine which to follow?

Answer: ALJ decisions are not precedential in nature. They are only binding in the particular case that is decided by the ALJ. If there is a conflict between an ALJ decision and the TAG or other Department of Labor policy, certifying officers are expected to follow the TAG and the relevant DOL policies.

By affirming the denial of the petitioners application for reason distinctly different from that cited by the CO in the Notice of Findings, the ALJ not only violated the applicable procedural rules, but also impeached the CO's decision on the Merits. For if the job could be performed by one live-out worker from 9 to 5, there should be no reason to look for additional worker, and if the second worker was necessary, it was not true that the job could be performed by one worker form 9 to 5. Thus either the CO's decision or the ALJ's "affirmance" must be wrong. They cannot be both true, for they impeach one another.

The Secretary's own rules provide that

> ...a case should never be denied in the final determination for a reason not previously explained or referenced in the Notice of Findings. ... A new or amended Notice of Findings should be issued if the certifying officer finds grounds for denial not previously cited in a Notice of Findings. TAG I-F.656.25.3.

Thus in order to preserve the petitioners' right to be heard, the ALJ should have remanded their case to the CO for new Notice of Findings, or in the alternative should have held a hearing. Both options would have afforded the opportunity to the petitioners to rebut this newly injected assertion that the job could be performed by two live-out workers. Instead, the ALJ "affirmed" the denial on the new ground without new Notice of Findings and without a hearing. By doing so, the ALJ openly violated applicable regulations, which specifically provide that the ALJ may only: (1) affirm, (2) reverse, (3) remand, or (4) hold a hearing, "on the basis of the record upon which the denial of labor certification was made" [20 CFR §656.26(e)].

Since the assertion of the new reason for denial was made by the ALJ without a hearing, and it was absent in the CO's

Notice of Findings, it was clearly beyond any administrative rebuttal by the petitioners. The petitioners could present their rebuttal for the first time in their complaint to the District Court, and they have done so.

In their 20 page complaint memorandum, the petitioners rebutted in detail the "two workers alternative" on the merits, and in addition they produced a copy of another application, which was approved by the same Certifying Officer on March 20, 1984, on the strength of identical business necessity as that of theirs.

When presented with this prima faciae evidence that petitioners' application was denied for extrinsic reasons, on which the petitioners had no opportunity to be heard, the District Court had two options:

(1) To disallow the new reason for the denial on the ground that it was asserted by the ALJ in violation of applicable rules

and to remand the case for further proceeding to determine the merits of "two worker alternative" by way of new Notice of Findings, or

(2) To accept the ALJ's decision in lieu of new Notice of Findings and the complaint memorandum in lieu of new rebuttal, and try the issue de novo on the basis of all available evidence.

Both options would be allowable under Overton Park rule. Cf. Secretary of Labor v Farino (490 F2d 885), containing the most comprehensive application of Overton Park rule to labor certification procedures. Instead, the District Court did accept the ALJ's two-worker argument as valid, and disallowed petitioners arguments to the contrary for the reason that "these arguments were apparently not made before the ALJ". From this standpoint, the District Court concluded that the Secretary's decision was not arbitrary (A22)

This error of the District Court and the inconsistency of its opinion with the standards of review of labor certification denials established in Secretary of Labor v Farino, 490 F2d 885, on the basis of Citizens to Preserve Overton Park v Volpe, 401 US 402, was brought to the Court of Appeals' attention in the brief on appeal. However, the Court of Appeals affirmed the District Court's judgment, and held that Mr & Mrs Ricatto should renew their application all over again "to demonstrate that other alternatives, including the one mentioned by Judge Sifton, are unavailable" (A-29). By doing so, the Court of Appeals for the Second Circuit in effect added the third option to the two available under Overton Park and Farino. This new option, to uphold the arbitrary denial on the theory that applicant can reacquire the right to be heard by renewing the application, is clearly inconsistent with Overton

Park and Farino, and in addition logically contradicts the Court of Appeals' own reasoning in its decision of December 10, 1986 (A). Aside from that, the Court of Appeals reasoning contains assertions of fact, which are demonstrably false.***

*** Contrary to the Court of Appeals' assertion, the ALJ never held any hearing. The assertion, that "the Ricattos had an opportunity before the certifying officer and the ALJ to prove business necessity by indicating why reasonable alternatives were unavailable" and "their evidence was simply deemed insufficient", is not only factually incorrect, but is procedurally impossible. The Ricattos had in fact the opportunity to rebut Certifying Officer's findings, and they had effectively done so. If their rebuttal of CO's findings would be anything but sufficient, the ALJ would have affirmed on the record, without injecting his own new reason for denial. But the procedure for administrative appeals does not allow any new evidence to be presented before the ALJ without a hearing. And that explains why the ALJ never held the hearing the Ricattos had requested.

These false assertions of fact play very important procedural role in Court of Appeals' reasoning. Without asserting point-blank that ALJ confirmed the CO's decision after a hearing, and that the Ricattos had an opportunity before the ALJ to rebut his findings, the Court of Appeals would have no choice but to reverse the judgment below.

On the one hand, the Court of Appeals denied point blank that the Ricattos were deprived their right to be heard on the issue of "two-workers alternative", but on the other, it stated in no uncertain terms that the Ricattos should renew their application precisely for the purpose of presenting their arguments on the very same "alternative". All these inconsistencies were brought to the Court of Appeals attention in the petition for rehearing, however, that petition was denied on March 9, 1987.

Upon careful analysis, both the District Court's and the Court of Appeals' decisions tend to reflect judicial frustration and lack of control over maze of technical details involved in this case. Frustrated with all these technicalities and being unable to devote substantial time to research the problems involved, the courts decided this case on collateral

grounds just to "get rid" of this horror of a case. In view of the Secretary of Labor's total failure to discharge his duties under applicable laws, such outcome was predictable.

The record shows, that the Secretary of Labor consciously sought such outcome. And so, before the District Court, the Secretary of Labor introduced the accusation that alien Sidz worked for Mr & Mrs Ricatto since December 1984 without proper authorization from the Immigration and Naturalization Service. The Secretary not only knew that this accusation was false, but engaged in elaborate effort to frustrate the petitioners' attempts to obtain the proof to the contrary. Even if this accusation would be true, it was still immaterial and irrelevant to the question whether to issue or not to issue the labor certification in question. The only reason the Secretary injected this

accusation was to prejudice the plaintiffs case; it is not unusual for the courts to decide the case on the basis who is the "good guy" and who is the "bad guy", regardless of the legal merits of the case. Similar purpose was behind the Secretary's assertion that the petitioners might renew their application six months after the denial of their present application is final. It supplied the "life line" to the Court of Appeals to get out of this whole "disaster" and to send the entire package back to the administrative agency which is well enough equipped to handle all these technicalities. While accepting this "life line" the Court of Appeals totally overlooked the precepts of Overton Park rule. There is quite a difference between remanding the case back to agency, and affirming the denial on the theory that additional hearing before agency can be secured by renewing the application.

Everything that happened in this case can be easily traced to the Secretary's failure to administer properly the review procedures within Department of Labor itself. The very purpose of introducing the institution of the Administrative Law Judge was to relieve the courts from time consuming technical matters, which could best be resolved by the agencies themselves. Unfortunately this purpose was frustrated in case of Department of Labor, for its Office of Administrative Law Judges set up a system, which by no means could be reconciled with the most elementary standards of jurisprudence.

At the outset, Department of Labor asserted that ALJs' decisions are not precedential in nature as against DOL itself, while continuously asserting the very same decisions as "precedents" against the public. Worse yet, there is no logic or consistency in this DOL's assembly of

"precedents". In DOL's "stocking" there is always "a court case" (i.e. ALJ's decision) for or against anything, whichever is needed at the moment. Even if the ALJ's decision is reversed by the District Court, it may still remain in DOL collection for future use. This whole system is patently repugnant to the stare decisis principle, and cries to the high heaven for judicial intervention. For years and years, the American Immigration Lawyers Association, an affiliated organization of the American Bar Association, has been submitting memoranda to Department of Labor, suggesting that orderly system of designation of leading decisions as precedential should be developed, and the orderly system of overruling the obsolete ones as well. Neither one of these memoranda was ever acted upon. The ALJ Office continues to be a rubber stamp institution, simply "passing the buck" to federal courts.

The case at bar would never make to the courts, if truly precedential system would exist in the ALJs' Office; it would be competently adjudicated right there. The courts are simply not equipped to handle so technical matters, which makes certain "shorcuts" and decisions on collateral grounds quite likely, which in turn generates more and more of appellate litigation. The only way to break this vicious cycle is to insure that the administrative review procedure conforms to the stare decisis principle.

Reasons for Granting the Writ

This Court should grant the Writ of Certiorari for three reasons set forth in Rule 17.1.(a) and (c).

Reason I: The Court of Appeals for the Second Circuit has decided a federal question in conflict with applicable decision of this Court.

The standards for judicial review of the administrative decisions, set forth in Citizens to Preserve Overton Park v Volpe, (401 US 402), and comprehensively applied to the labor certification proceedings in Secretary of State v Farino, 490 F2d 885, are very clear and simple. They could be summarized as follows:

If in the course of administrative proceedings, the procedural rules are not violated and the applicant is afforded the opportunity to be heard, the court will not substitute its discretion for that of the agency. But if the procedural rules are violated and the applicant is not afforded the opportunity to be heard, the court may either try the case de novo, or remand to the agency for further proceedings. The choice between trial de novo and the remand to the agency is a matter of judicial policy. This is the entire rule.

Instead of remanding the case to the District Court for trial de novo or for subsequent remand to the Secretary for further proceedings, the Court of Appeals for the Second Circuit affirmed the judgment of the District Court and directed the petitioners to file new application for the express purpose of reacquiring the right to be heard by the agency on the issues already presented to the District Court.

Reason II: When a federal court of appeals makes in its decision the assertions of fact which are demonstrably false on the record, and based on these assertions affirms the judgment of the trial court, when in the absence of these assertions reversal would have been mandatory, it is fair to conclude that such a court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Reason III: The important question of federal law has not been, but should be settled in this action. The intervention of this Court is needed to enjoin United States Secretary of Labor from tolerating the present practice in the Office of Administrative Law Judges, whereby Department of Labor enforces at random its prior inconsistent decisions against the public as "precedents", while at the same time denying precedential value to the very same decisions as against DOL itself.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
June 5, 1987

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX

APPENDIX

Decision of Administrative Law Judge

U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of
MR & MRS MICHAEL C. RICATTO
Employer

on behalf of

KRYSTYNA B. SIDZ
Alien

Case No.
85-INA-481

Joseph N. Tlaga, Esq.
For the Employer

BEFORE: ROBERT S. AMERY
Administrative Law Judge

DECISION AND ORDER

This proceeding was initiated by the above-named Employer who requested administrative-judicial review, pursuant to 20 CFR §656.26, from the determination of a Certifying Officer of the US Department of Labor denying an application for a labor certification which the Employer

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submitted on behalf of the above named alien, pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 USC §1182(a)(14) (hereinafter the Act).

Under Section 212(a)(14) of the Act an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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The procedures whereby such immigrant labor certifications may be applied for, and granted or denied, are set forth in 20 CFR Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR 656.21 have been met. These requirements include the responsibility of the employer to recruit US workersat the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of US worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File (hereinafter AF), and any written argument of the parties. 20 CFR §656.26(e).

Decision of Administrative Law Judge

Statement of the Case

The Employers, Mr and Mrs Michael C. Ricatto, live in East Norwich, New York. (AF 9, 47). Mrs Ricatto, who has a heart condition and has undergone open heart surgery, visits a doctor and attends a medically prescribed exercise program each day. Mr Ricatto leaves for work early each morning, and often works until late at night. (AF 26, 27, 54-55).

The Alien, Krystyna B. Sidz, is a citizen of Poland. (AF 8, 46). She has worked for the Employers as a houseworker since December 1984, and was previously a maintenance worker doing housework for over a year for a swim club of which Mr Ricatto was the president. (AF 8, 46). The Employers seek labor certification for the Alien in a position as a live-in houseworker, responsible for cooking, cleaning, making beds, answering the telephone, and

dojng other errands and personal services. The Employers require the houseworker to live with them in case of an emergency, in view of Mrs Ricatto's heart condition. (AF 9, 47).

In her notice of FIndings, dated July 17, 1985, the Certifying Officer denied certification, stating thet the live-in requirement for a houseworker is not normally required for the position as defined in the Dictionary of Occupational Titles and is only justified by evidence of business necessity. The Certifying Offier stated that the duties could be performed by a live-out worker during a normal work schedule. She also stated that the Alien was being asked to perform the combined duties of a Houseworker General, (in cleaning and washing) and a Home Attendant (dealing with medical emergencies), and this also had to be justified by business

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necessity. The Employers, moreover, would have to pay $5.00 per hour for a home Attendant.[1] (AF 21-23, 49-51).

In their rebuttal, dated July 22, 1985, the Employers attempted to clarify the Alien's duties. They stated that the Alien needed to remain at the Employers' home so that, if there was an emergency while Mr Ricatto was working late, someone would be there to call for help. (AF 53-55 25-27). The Alien would not provide any medical care herself, so she would not be performing the duties of a Home Attendant as well as a Housekeeper, and thus the

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1 The Certifying Officer also found the Alien's past experience with one previous employer to be improperly documented because it was based on the alien's own Affidavit. (AF 22, 50). The Alien, however, has adequately documented her one year experience with the Forest Hills Swim Club, thus meeting the Employer's three months experience requirement. (AF 3, 41, 48).

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Employers contended they should not need to justify a combination of duties or raise the wage to $5.00 per hour. (AF 53-55, 25-27). The Employers also attempted to justify the live-in requirement, noting that, because of Mrs Ricatto's heart condition, someone needed to be present at all times in order to call for help in case of an emergency. (AF 27-28, 55-56).

In her Final Determination, dated August 9, 1985, the Certifying Officer denied certification, stating that the Employer failed to establish a business necessity for the live-in requirement. The Certifying Officer found that the employers failed to show "how a Houseworker General not living in would affect the operation of the household." (AF 34, 59). The Final Determination also found that the Employers failed to justify the combination of duties or amend the wage offer

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to $5.00 per hour. (AF 34, 59). The Employers, in their appeal, relied on their rebuttal statement of July 22, 1985.

Discussion

To justify a live-in requirement for a houseworker, an employer must show a special need that makes the requirement a business necessity; otherwise, it is assumed to be a mere preference or convenience. In the Matter of Carol Kosow, 79-INA-129 (April 5, 1979). This requires a showing that there are no workable alternatives to the live-in requirement. In the Matter of Regina Salvi, 80-INA-191 (August 1, 1980).

The Employers argue that they have a business necessity for the live-in requirement because of Mrs Ricatto's heart condition. Her husband often works until late at night, and someone needs to be present to call for help in case of a

medical emergency. The Employers, however, have failed to show that there are no workable alternatives to the live-in requirement. The Employers could, for example, hire one person to perform household chores from 9:00 a.m. to 5:00 p.m., and a house sitter who would be present from 5:00 P.M. until late at night to call for help in case of an emergency. See In the Matter of Gloria Botchman, 82-INA-261 (November 4, 1982). Neither of these people would have to live with the Employers. While some cases have found a business necessity for a live-in housekeeper, these usually involved the care of young children, in which the court found that such a consideration requires the same housekeeper to be present throughout the day. See In the Matter of Mrs Benjamin Scotti, 83-INA-114 (February 18, 1983). Here, the need for the Alien to remain at

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the Employers residence after work hours is simply to be present in case of an emergency. There is no need for this duty to be performed by the same person who performs household duties during the day. Accordingly, I find that the Employers have failed to establish a business necessity for the live in requirement.

ORDER

For the foregoing reasons, the Certifying Officer's denial of labor certification is affirmed.

s/ROBERT S. AMERY

Administrative Law Judge

Dated: 18 December 1985

Washington, D.C.

Decision of District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-86-0543

MICHAEL C. RICATTO et allia,
Plaintiffs,

-against-

MEMORANDUM
AND ORDER

WILLIAM BROCK, US Secretary
of Labor,
Defendant.

SIFTON, District Judge

This is an action for declaratory judgment challenging the Department of Labor's denial of an application for labor certification which Michael and Mary Ricatto ("the employers") submitted on behalf of Krystyna B. Sidz ("the alien"). The application was submitted pursuant to §212(a)(14) of the Immigration and Nationality Act, 8 USC §1182(a)(14). This matter is now before the Court on the parties' cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil procedure.

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The facts relevant to these motions are undisputed. The plaintiff employer live in East Norwich, New York. Mrs Ricatto, who has a heart condition and has undergone open heart surgery, visits a doctor and attends a medically prescribed exercise program each day. Mrs Ricatto also apparently spends the afternoon hours paying and receiving social visits, shopping, and attending charity meetings or other cultural or religious events. Mr Ricatto, a businessman, leaves for work each day at 8:00 a.m. He occasionally, according to plaintiffs, must work late and does not return home until 9:00 or 10:00 p.m.

The plaintiff alien is a citizen of Poland. She has worked without authorization from the INS for the employers as a live in housekeeper since December 1984 and was previously a maintenance worker

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doing housework at a swim club of which Mr Ricatto was president.

The employers seek labor certification for the alien in a position as a live-in housekeeper, responsible for cleaning, making beds, answering the telephone, and doing errands and personal service. The sole reason the employers wish the housekeeper to live with them is that someone might be present to call for help in case of an emergency on those occassions when Mr Ricatto must work late.

The employers advertised for the position, requiring at least three months experience and a willingness to live-in with the employers. Four applicants responded, but none was hired. Two were non-resident aliens lacking employment authorization; one only wanted a temporary job; one wanted to negotiate the live-in requirement.

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In his final determination dated August 9, 1985, the certifying officer denied certification, concluding that the employers had failed to establish the requisite "business necessity" for a live-in housekeeper. Plaintiffs sought a reviev of the denial of the labor certificate before a Department of Labor Administrative Law Judge ("ALJ") pursuant to 20 CFR §656. 26. The ALJ reviewed the certifying officer's denial of plaintiffs' application for labor certification based upon the record upon which the denial was made, together with the request for review. The ALJ upheld the determination of the certifying officer on the following reasoning:

> "To justify a live-in requirement for a houseworker, an employer must show a special need that makes the requirement a business necessity; otehrwise, it is assumed to be a mere preference or convenience. This requires a showing that there are no workable alternatives to the live-in requirement. The employers argue that they have a business neces-

sity for the live-in requirement because of Mrs Ricatto's heart condition. Her husband often works until late at night, and someone needs to be present to call for help in case of a medical emergency. The employers, however, have failed to show that there are no workable alternatives to the live-in requirement. The employers could, for example, hire one person to perform household chores from 9:00 a.m. to 5:00 p.m. and a house sitter who would be present from 5:00 p.m. until late at night to call for help in case of an emergency. Neither of these people would have to live with the employers. While some cases have found a business necessity for a live-in housekeeper, these usually involved the care of young children, in which the court found that such a consideration requires the same housekeeper to be present throughout the day. Here, the need for the alien to remain at the employers' residence after work hours is simply to be present in case of an emergency. There is no need for this duty to be performed by the same person who performs household duties during the day. Accordingly, I find that the employers have failed to establish a business necessity for the live-in requirement."

Section 212(a)(14) of the Act provides for the exclusion of aliens seeking permanent employment, unless --

Decision of District Court

> "the Secretary of Labor has determined ... that (A) there are not sufficient workers who are able, willing, qualified ... and available at the time of application for a visa ... and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed."

In 1977 the Secretary of Labor promulgated regulations setting forth the procedures "whereby such immigrant labor certifications may be applied for, and given or denied." 20 CFR 656. See Production Tool Corp. v Employment & Training Admin., 688 F2d 1161, 1164 (7th Cir. 1982). Under these regualtions an employer seeking labor certification for an alien must actively recruit American workers to determinewhether there are American workers who are able, willing, qualified, and available for the position. Thus, the regulations require documentation which shows:

> " (i) The employer has advertised and is still advertising the job opportunity without success in such media

> as newspapers of general circulation, and ethnic and professional publications;
>
> (ii) The employer's advertising offfers prevailing working conditions and requirements and the prevailing wage for the occupation calculated pursuant to §656.40 of this Part, states the rate of pay, offers training if the job opportunity is the type for which the employer customarily provides training, and offers wages, terms and conditions of employment which are no less favorable than those offered to the alien;
>
> (iii) The employer's advertising describes the job opportunity with particularity; the documentation shall include a copy of at least one advertisement placed by the employer;
>
> (iv) The employer's advertising has produced no satisfactory results."

20 CFR §656.21(b)(9). Moreover, in advertising the job, the employer may not include "unduly restrictive job requirements" that would make it less likely that an American would apply for the job. Unduly restrictive job requirements are defined as follows:

> "The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:

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(i) The job opportunity's requirements, unless adequately documented as arising from business necessity:
(A) Shall be those normally (sic) for the job in the United States;
(B) Shall be those defined for the job in the Dictionary of Occupational Titles (DOT") including those for subclasses of jobs;
(C) Shall not include requirements for a language other than English."

There is no apparent dispute between the parties that the live-in requirement for the housekeeper job is not included in the definition in the DOT and can, therefore, be justified only on the basis of business necessity. Thus, whether the ALJ was correct in denying the present labor certification for failure to establish business necessity for a live-in housekeeper is the sole question presented in this case.

Under 5 USC §706(2)(A), the scope of review of a denial of alien labor certification is limited to a determination as to

whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Accupuncture Center of Washington v. Dunlop, 543 F2d 852, 859 (DC Cir.), cert. denied 429 US 818 (1976), citing Pesikoff v. Secretary of Labor, 501 F2d 757, 761 n.5 (DC Cir.), cert. denied, 419 US 1038 (1974). Furthermore, this Court's review must be confined to an examination of the administrative record. Doraiswamy v. Secretary of Labor, 555 F2d 832, 841 (DC Cir. 1976); Accupuncture Center, supra. As the Ninth Circuit explained in affirming the grant to defendant of a similar summary judgment motion in Kwan v Donovan, 777 F2d 479, 480 (9th Cir. 1983):

> "Under the arbitrary and capricious standard, the reviewing court is limited to deciding 'whether there has been a clear error of judgment by the agency and whether the agency action was based upon a consideration of relevant factors.' Nance v EPA, 645

F2d 701, 705 (9th Cir.), cert. denied, 454 US 1081 (1981). The scope of review under the arbitrary and capricious standard is limited, and a court may not substitute its judgment for that of the agency. Citizens v Volpe, 401 US 402, 416 (1971)."

In the present case, an examination of the administrative record clearly demonstrates that the denial of the alien labor certification was not arbitrary and capricious, even viewing the evidence in the light most favorable to plaintiffs.

The proper inquiry to be made in determining "business necessity" is not whether the restrictive qualification is reasonably necessary for the purpose of the job, or whether the job qualification would contribute to the convenience or serve the personal preference of the employer. Kwan supra at 482. Rather, the business necessity test is a much more restrictive one in which the employer must prove that the requirement is so essential to the perform-

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ance of the job that the essence of the business operation would be undermined without it. See, e.g., Diaz v. Pan American World Airways, 442 F2d 385 (5th Cir. 1971).[1]

In the present case the ALJ concluded that the employers did not meet their burden of adequately documenting their need for a live-in housekeeper. The employers argue that Mrs Ricatto's heart condition and the fact that Mr Ricatto sometimes works late render it necessary that someone be present in the home to call for help in case of emergency. Even assuming that plaintiffs were able to

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1 There is no apparent dispute between the parties concerning this interpretation of "business necessity". Furthermore, this Court notes that an agency's interpretation of its own regulations is controlling unless "plainly erroneous or inconsistent". United States v Larionoff, 431 US 864, 872 (1977).

prove this necessity, they have not provided any documentation as to why there are no workable alternatives to the live-in requirement. The ALJ suggested, for example, that the employers could hire one person to perform household chores and another person to act as a house sitter on the necessary evenings. The employers argue that such a solution would not work because of the stress it would cause and its economic unfeasibility. However, these arguments were apparently not made before the ALJ. Moreover, there is certainly no documentation in the administrative record that the ALJ's proposal solution would create any undue stress that might endanger Mrs Ricatto or that the solution would, in fact, be economically unfeasible. Accordingly, it is appropriate to conclude that the Secretary's decision denying the labor certification was

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not arbitrary and capricious. This is not to conclude that business necessity for a live-in housekeeper in a situation like the present one can never be proved;[2] instead, this Court is simply concluding that plaintiffs failed to document adequately the business necessity in the present case. Accordingly, defendant's motion for summary judgment is granted.

The Clerk is directed to enter judgment dismissing the complaint and to mail a copy of the within to all parties.

SO ORDERED. s/Charles P. Sifton, USDJ

Dated: Brooklyn, New York, June 19, 1986

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2 Thus, for example, the ALJ noted in his opinion that live-in housekeeping could be found to be necessary in cases including the care of young children, where there are important reasons to have the same housekeeper present throughout the day. In the present case, the ALJ concluded that plaintiffs made no showing of a need for the duties performed to be performed by the same person.

Final Judgment of District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL C. RICATTO et alia,
Plaintiffs,
-against-
WILLIAM BROCK, US Secretary of Labor,
Defendant.

JUDGMENT
CV-86-0543
(CPS)

ENTERED
6/26/86

A memorandum and order of Honorable Charles P. Sifton, United States District Judge, having been filed on June 24, 1986, granting the defendant's motion for summary judgment and directing the clerk of the court to enter a judgment dismissing the complaint, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant; that the defendant's motion for summary judgment is granted; and that judgment is hereby entered dismissing the complaint.

s/Robert C. Heinemann

Clerk of Court

Dated: Brooklyn, New York, June 25, 1986

Order of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of December, one thousand nine hundred and eighty-six.

Present: HONORABLE WILFRED FEINBERG,
Chief Judge.
HONORABLE JON O. NEWMAN,
HONORABLE ROGER J. MINER,
Circuit Judges.

MICHAEL C. RICATTO, MARY V. RICATTO,
AND KRYSTYNA B. SIDZ,
Plaintiffs-Appellants,

v. 86-6141

WILLIAM BROCK, U.S. SECRETARY OF LABOR,
Defendant-Appellee.

O R D E R

FILED DEC 10, 1986
ELAINE B. GOLDSMITH, CLERK

Michael c. Ricatto, Mary V. Ricatto, and Krystyna B. Sidz appeal from a judgment of the District Court for the Eastern District of New York (Charles P. Sifton, Judge) granting summary judgment in favor of the Secretary of Labor in a suit challenging the denial of the Ricattos' appli-

cation for labor certification submitted on behalf of Ms Sidz, an alien. The Ricattos are endeavoring to retain the services of Ms Sidz to perform housekeeping duties at their home and to be available during evening hours, on occasions when Mr Ricatto is obliged to work late, so that she can summon help for Mrs Ricatto in the event that Mrs Ricatto, who is recovering from heart surgery, should require medical attention. In advertising to fill the position, the Ricattos specified that the person they wished to hire must live in at their home. The issue before the Department of Labor was whether the Ricattos had sustained their burden of proving that this live-in requirement was justified by "business necessity"; if it was not, the live-in requirement would be an "unduly restrictive job requirement", which would preclude the granting of a

labor certificate for Ms Sidz. See 20 CFR §656.21(b)(2).

The certifying officer of the Department of Labor determined that the Ricattos had not presented sufficient evidence to prove that the live-in requirement was a business necessity, and this decision was confirmed, after a hearing, by an administrative law judge (ALJ). Judge Sifton, applying the standards of 5 USC §706(2)(A), concluded that the administrative decision denying the labor certification was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".

To establish that the live-in requirement was a necessity, the Ricattos were obliged to show circumstances justifying the requirement and indicating that their needs could not be met by reasonable alternative arrangements. Judge Sifton was

correct in concluding that the Department had not acted arbitrarily in determining that the Ricattos had not sustained their burden of proof. The Ricattos contend that Judge Sifton's opinion unfairly faults them for not including in the record before the ALJ a specific rebuttal to the ALJ's observation that one alternative might be a daytime housekeeper and a second person to act as a house-sitter during evening hours. We do not understand Judge Sifton to mean that the Ricattos omitted any rebuttal evidence to the suggestion mentioned in the ALJ's opinion. Rather his point is simply that the Ricattos had an opportunity before the certifying officer and the ALJ to prove business necessity by indicating why reasonable alternatives were unavailable. Their evidence was simply deemed insufficient to sustain their burden of proof.

Order of Court of Appeals

The judgment of the District Court is affirmed. Our affirmance is, of course, without prejudice to any renewed application the Ricattos may be entitled to make, under applicable regulations, to demonstrate business necessity. In any such application, presumably, the Ricattos could attempt to demonstrate that other alternatives, including the one mentioned by Judge Sifton, are unavailable.

s/WILFRED FEINBERG, Chief Judge
s/JON O. NEWMAN, Circuit Judge
s/ROGER J. MINER, Circuit Judge

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Final Order of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of March one thousand nine hundred and eighty seven.

Present: HON. WILFRED FEINBERG, Ch.J.
HON. JON O. NEWMAN,
HON. ROGER J. MINER,
Circuit Judges

No. 86-6141

MICHAEL C. RICATTO, MARY V. RICATTO and KRYSTYNA B. SIDZ,
Plaintiffs-Appellants,

-v-

WILLIAM BROCK, U.S. SECRETARY OF LABOR,
Defendant-Appellee.

A petition for a rehearing having been filed herein by Plaintiffs-Appellants, Michael C. Ricatto, Mary v. Ricatto and Krystyna B. Sidz. Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/Elaine B. Goldsmith
Clerk

FILED MAR 9, 1987